Supreme Court, U.S.
FILED
JAN 24 1997
CLERK

No. 96-858

In The

Supreme Court of the United States

October Term, 1996

MARTIN D. LAMBERT, in his official capacity as Gallatin County Attorney,

Petitioner,

v.

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D.; SUSAN CAHILL, P.A.; DOUBLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O.; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Respondents' opposition to the petition misconstrues this Court's decision in *Bellotti v. Baird*, 443 U.S. 622 (1979); glosses over the significance of the fact that the Court specifically upheld the constitutional adequacy of parental notice statutes in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990), with best interests standards substantively indistinguishable from that in Mont. Code Ann. § 50-20-212(5)(b) (1995); and reflects a fundamental misunderstanding of the differences between parental notice and parental consent statutes. The opposition additionally treats as dicta in *Planned Parenthood of Atlanta, Inc. v. Miller*, 934 F.2d 1462 (11th Cir. 1991), what the court there clearly intended to be a binding determination and dismisses the importance of the decision below to Montana and other States with comparably-worded best interests standards. The Respondents' forced reasoning serves principally to underscore the appropriateness of granting the petition and either summarily reversing the Court of Appeals or setting this matter for plenary briefing and argument.

ARGUMENT

I. THE RESPONDENTS' READING OF *BELLOTTI* CANNOT BE ACCEPTED IN VIEW OF THE COURT'S ANALYSIS THERE OR IN *MATHESON*.

The Respondents argue that, under *Bellotti*, a court first must determine whether an abortion is in an immature minor's best interests before deciding whether waiver of the parental notice requirement should be granted. Their argument is grounded in the plurality opinion's statement that, "[i]f, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement." 443 U.S. at 648; *see* Resp'ts Br.

in Opp'n ("Opp'n") at 5. That statement, however, must be taken in context and, when so taken, does not support the legally and practically odd result advanced by the Respondents.

The Massachusetts statute at issue in *Bellotti* contained a two-parent consent requirement. 443 U.S. at 625 (quoting Mass. Gen. Laws Ann. ch. 112, § 12S (West Supp. 1979)). That requirement was subject to judicial waiver, but the Massachusetts Supreme Judicial Court construed the statute to require parental notification of the bypass proceeding unless a parent was unavailable or an emergency existed. *Id.* at 630. One question before this Court accordingly was whether notification could be mandated in all other instances consistently with the Due Process Clause. In answering the question negatively, the plurality opinion stated "every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents." *Id.* at 647. The Court nonetheless held further that a bypass decisionmaker possesses the discretion to deny the request outright on the ground that an abortion without parental consent is not in the minor's best interests *or* to defer resolution of the waiver request. *Id.* at 648.

The standard governing exercise of that discretion in the latter instance plainly is not whether the abortion itself is in the minor's best interests – since answering that question would dispose of the request's merits under a consent statute – but whether the minor's best interests would be served by parental consultation prior to resolution of the minor's petition. Parental notice statutes like Montana's implicate only the second of these situations because the minor, not a court or a parent, ultimately determines whether an abortion occurs. The need for or the advisability of parental notification is, in short, part and parcel of the "all things considered" referred to in the *Bellotti* excerpt upon which the Respondents rely. *See* Br. Amicus Curiae of States of Nebraska et al. at 9-10.

The Respondents' reading of *Bellotti* also runs headlong into this Court's decision two years later in *H.L. v. Matheson*, 450 U.S. 396 (1981). There, the Court upheld a Utah parental notice statute without a bypass provision in a class action challenge by an unemancipated minor who made no showing as to her maturity or relationship with her parents – i.e., who failed to establish either that she was mature or that notification was not in her best interests. *See id.* at 405. The Court found no need to decide whether a bypass procedure was constitutionally mandated where simple parental notice was compelled because "[m]embers of the particular class before us in this case have no constitutional right to notify a court in lieu of notifying their parents." *Id.* at 412 n.22. The only conclusion to be drawn from the Court's statement in this regard was that notification can be required without unduly burdening an immature minor's access to abortion if she fails to establish such notice is not in her best interests.

Indeed, that is exactly the meaning Justice Powell assigned in his *Matheson* concurring opinion, where he stated that he joined with the majority "on the understanding that [its opinion] leaves open the question whether [the Utah statute] unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification." *Id.* at 414. He then reiterated his view that, while the petitioner's position that the Utah statute was "per se an invalid burden on the asserted right of a minor to make the abortion decision" (*id.* at 419), "a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently *or that notification otherwise would not be in her best interests*" (*id.* at 420; emphasis supplied). The Respondents' interpretation of *Bellotti* cannot be squared with that decision or *Matheson*.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH *AKRON* AND *HODGSON*.

The Respondents argue that "[n]o opinion of this Court since *Bellotti* . . . has purported to analyze the standard applicable to immature minors seeking authorization for an abortion under a parental notification statute." Opp'n at 7. They thus claim that "[n]either *Hodgson* nor *Akron II* . . . involved a challenge to the judicial bypass standards applicable to immature minors." *Id.* at 6. Nonetheless, in *Akron* the majority opinion equated the best interests standard in Ohio Rev. Code Ann. § 2151.85(C)(2) (Anderson 1994), which is identical to § 50-20-212(5)(b), to the best interests standard in the *Bellotti* statute (497 U.S. at 511), while Justice Stevens' concurrence expressed his view that parental notice laws must provide an opportunity for immature minors to show that "*notice* would not be in her best interests" (*id.* at 522; emphasis supplied). In the companion case, *Hodgson*, Justice O'Connor's opinion controlled and found the Minnesota two-parent notice statute permissible only because of a bypass procedure that, in relevant part, used a best interests standard comparable to Ohio's. 497 U.S. at 427 n.9 (op. of Stevens, J.); *id.* at 461 (op. of O'Connor, J.).

The Respondents' contention that this Court has not upheld the constitutional adequacy of the standard in § 50-20-212(5)(b) and in a dozen other States' laws accordingly strains credulity. Yet even were they correct, the appropriateness of resolving the issue would be unaffected. The Court of Appeals' decision in *Glick* notwithstanding, *Akron* and *Hodgson* cannot be read fairly to establish other than that any bypass procedure substantively indistinguishable from those upheld in those cases is valid under the Due Process Clause in a facial challenge like the one here. However, if that reading is inaccurate, the Court should clarify the standard and thereby allow States desiring to enact parental consent legislation

to do so consistently with applicable constitutional restraints.

III. THE RESPONDENTS' PORTRAYAL OF THE MONTANA STANDARD AS AN UNDUE BURDEN NOT ONLY MISCONSTRUES THE DIFFERENCES BETWEEN PARENTAL NOTICE AND CONSENT STATUTES BUT ALSO IGNORES *CASEY*.

The Respondents justify the rule adopted in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), and applied below by contending that use of the best interests standard in the Montana statute "will prevent some minors from obtaining an abortion without parental involvement even though, under the correct *Bellotti* test, they would obtain judicial approval for an abortion" (Opp'n at 9) and that, "[b]y shifting the emphasis away from the best interests of the child in having the abortion, [the Montana statute] violates the purpose of the bypass procedure" (*id.* at 13). Their analysis fails to account for the differing purpose of the bypass procedure under parental consent and notice laws or for this Court's reasoning in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

That the focus of the bypass procedure under a parental notice statute is on whether the notice requirement should be waived is hardly surprising. The minor is not asking the bypass decisionmaker to stand in the shoes of her parent for purposes of determining whether an abortion should occur, since that decision is the minor's alone to make. Even if one accepts arguendo the Respondents' speculation over the relative difficulty of showing that notice, as opposed to the abortion itself, is in the minor's best interests (Opp'n at 10-11), evidence going to the advisability of the latter is, except as it bears upon the appropriateness of notice, unnecessary given the minor's absolute right to have the abortion regardless of whether a parent or a third party believes it is in her best interests. Thus, the "purpose of the bypass proceeding" under a

notice statute is not, as the Respondents assert, for "the court to function as a surrogate for a parent, considering, as the parent would, whether the *abortion* is in the minor's best interest." Opp'n at 12; *see Matheson*, 450 U.S. at 411 ("[t]he Utah [parental notice] statute gives neither parents nor judges a veto power over the minor's abortion decision"); *Bellotti*, 443 U.S. at 654 & n.1 (Stevens, J., concurring) (observing that, under the Massachusetts parental consent statute, "the minor's decision to secure an abortion is subject to an absolute third-party veto," and noting further that "[b]y affording such a veto, the . . . statute does far more than simply provide for notice to the parents").

The concern animating the Respondents' position is their apparent belief that parents will overbear their daughter's decision for reasons unrelated to her best interests or otherwise will retaliate against her. Opp'n at 8, 11. Presumably, however, bypass decisionmakers will be sensitive to those possibilities because they relate directly to whether parental notice is in the minor's best interests. The Respondents ignore this presumption and, in so doing, the admonition in the *Casey* joint opinion that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect of the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877. Simply put, it makes no sense to characterize the standard in § 50-20-212(5)(b) as embodying an undue burden when it merely asks a disinterested third party to determine whether the presumption that parents will act to further the best interests of their child has been rebutted. *Id.* at 895 (parental notice statutes "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart").

IV. A CONFLICT EXISTS BETWEEN *MILLER* AND THE DECISION BELOW.

The Respondents contend the Eleventh Circuit's determination in *Miller* that the Georgia bypass procedure's best interests provision "sufficiently accords with constitutional standards" (934 F.2d at 1477 n.21) is dicta which should be disregarded for the purpose of establishing an inter-circuit conflict under S. Ct. R. 10(a). Opp'n at 13-15. Nevertheless, the *Miller* court undoubtedly did not believe its analysis was dicta, since it was one predicate for a "hold[ing]" that the Georgia law comported with *Bellotti* requirements and thereby eliminated the need to determine whether any bypass procedure was necessary in a parental notice statute and, if so, the extent to which such a procedure need parallel *Bellotti*. *Id.*; *see also id.* at 1471 ("[i]n part IV, we show that the Georgia Act's judicial bypass procedure, even if judged pursuant to *Bellotti* requirements, survives constitutional scrutiny").

The rather startling contention by the Respondents that the Eleventh Circuit, and by implication this Court in *Akron*, was without jurisdiction to decide the validity of the best interests provision because it was not challenged in *Miller* (Opp'n at 14) similarly ignores the fact that plaintiffs there had attacked the validity of the notice-statute bypass procedure and that the court of appeals, following *Akron*'s lead, determined to resolve the challenge by reference to the more stringent *Bellotti* consent-statute requirements. Moreover, as noted in the petition (Pet. at 19 n.6), the plaintiffs in *Glick* did not challenge the validity of the best interests standard in the Nevada statute, and the Respondents thus ask this Court to deny the petition despite law-of-the-circuit reliance by the panel below on a decision that, were their reasoning credited, was issued in relevant part without jurisdiction. It is instead plain that a justiciable controversy existed over the validity of the bypass procedure in *Miller* and *Glick* and that, at least as the court below construed *Glick*,

both circuits employed *Bellotti* standards to reach opposite results which would have been reviewable by this Court. *See Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995).[1]

V. AN ISSUE OF NATIONAL IMPORTANCE EXISTS.

The Respondents discount the significance of the Court of Appeals' decision, pointing out that the only State other than Montana whose federal courts are bound by the opinion is Nevada. Opp'n at 15-16. Even if one leaves aside the incompatibility of the Ninth Circuit's views with this Court's decisions and the Eleventh Circuit's opinion in *Miller*, the inescapable fact is that *every* State that has enacted a parental notice statute with a bypass procedure has utilized a best interests formulation similar or identical to Montana's.

The Respondents may well be correct in their implicit suggestion that the decision below will be treated as an anomaly in future litigation. Opp'n at 16. Nonetheless, the jurisprudential limbo they propose for the sensitive issue of parents' involvement in their children's abortion decisionmaking cannot be reconciled with the recognition

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[1] The Respondents' reliance on *Williams v Zbaraz*, 448 U.S. 358 (1980), is misplaced because there the court of appeals sua sponte placed at issue in a remand order the constitutionality of a federal statute when only a state law had been challenged and the plaintiffs' claim was capable of resolution without reference to the federal statute's validity. *Id.* at 364-68. In *Miller* and *Glick*, of course, a justiciable controversy existed over the validity of the bypass procedures, and the disputes' justiciability was unaffected by the courts' determination to resolve the challenges on somewhat different grounds than those advanced by the litigants. *Cf. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990) (resolving case on the basis of an issue neither decided below nor argued by the parties where it "was antecedent to [the questions presented] and ultimately dispositive of the . . . dispute").

that, commencing in *Roe v. Wade*, 410 U.S. 113 (1973), this Court has embarked on a course that "calls for the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Casey*, 505 U.S. at 867. Where the meaning of that mandate has been obscured by a lower court's erroneous interpretation, it should be explained or, as here, re-explained to avoid further dispute.

The Respondents suggest, finally, that the petition should be denied because there are alternative grounds on which the judgment below can be affirmed. Opp'n at 16-17. Those grounds involve quite problematic claims that were not addressed by either court below. Pet. App. at 12a, 16a. Accepting the Respondents' position therefore would insulate from review an issue that *was* decided on the basis of entirely separate questions never considered on the merits. They cite no relevant authority for this result. The unaddressed claims, which are outside the question presented in both the petition and the opposition, should be resolved by the lower courts on remand if the Court of Appeals' judgment is reversed. *See, e.g., Lebron*, 115 S. Ct. at 965-66; *Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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January 1997